

ACCESS DENIED: DOES INACCESSIBLE LAW VIOLATE HUMAN RIGHTS?

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ABSTRACT

Human rights law encourages due process and enforcement of laws. The presupposition, however, is that the law is accessible. In many justice sectors, particularly in the developing world, the law is not publicized or available, leading to compounding human rights challenges. This article suggests that access to law itself should be a basic human right and that accessibility must be prioritized on the global stage.

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INTRODUCTION

In a bustling open-air market in Uganda's capital of Kampala, a registrar in the High Court ordered *chapate* (a greasy flour-based flatbread). The vender customarily wrapped the food in scrap paper before handing it over. The registrar—who works hard to organize and archive Uganda's law—was stunned when he received his meal. The scrap wrapping paper was an original case document from the files of the High Court.¹ This unpublished order, tucked away from the public, meant nothing more to the people than packaging.

English legal philosopher Jeremy Bentham wrote, "In the darkness of secrecy, sinister interest and evil in every shape, have full swing. Only in proportion as publicity has place can any of the checks, applicable to judicial injustice, operate. *Where there is no publicity there is no justice.*"²

While Bentham likely did not envision the law becoming a deli paper, this extreme scenario illustrates the risks of justice hidden from the public eye—it no longer matters. When justice is hidden, its legitimacy quickly erodes. Publicity, in many ways, is the backbone of justice, and a reason why justice sectors receive greater confidence in countries such as America:³

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¹ Greer Illingworth, *Dust, Must, and Archives—Part III*, WAVES OF JUSTICE (July 22, 2008), <http://lawmedia.pepperdine.edu/wavesofjustice/2008/07/22/dust-must-and-archives-part-iii/>.

² JEREMY BENTHAM, 9 THE WORKS OF JEREMY BENTHAM 493 (John Bowring ed., 1848) (emphasis added).

³ Even access to justice in the United States' highest court has come under recent scrutiny for not allowing cameras in the courtroom for oral argument. Kenneth W. Starr, *Open Up High Court to Cameras*, N.Y. TIMES (Oct. 2, 2011), <http://www.nytimes.com/2011/10/03/opinion/open-up-high-court-to-cameras> (stating "there is no reason the public should be denied access to their consideration of and arguments about urgent questions—from global warming to health care—that

The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.

...

Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.⁴

Without public access to the courts, its decision-making process, and the law, "[t]he legitimacy of the Court would fade with the frequency of its vacillation."⁵

In much of the developing world, the picture is quite different than in America, and legitimacy of the justice sector has already faded.

This article asserts lack of access to law as an understated human rights violation in developing countries. The nation of Uganda will be referenced frequently as a case study highlighting both the advances (which the Ugandan judiciary is working hard to accomplish) and the remaining roadblocks in its effort towards wider dissemination of law. Part I notes how access to law is a fundamental subset of the emerging fundamental human right of access to information and that many declarations of human rights take it for granted that citizens have access to the law by which they are governed. Part II shows how access to law is often not prioritized in practice, citing examples from the experiences of American law students who have clerked for the judiciaries of Uganda and other developing nations. Part III proposes possible solutions to the challenge of disseminating law in developing countries and discusses the steps involved in implementing these efforts.

I. THE RIGHT

Human rights violations and lapses in justice frequently occur when marginalized individuals and groups do not receive equal footing in front of the law. The law is misapplied to them or not applied at all. Still, a much more basic violation of human rights is occurring around the world when one cannot find the law at all. Simply put, the

affect us all. Cameras in the courtroom of the United States Supreme Court are long overdue.").

⁴ *Planned Parenthood v. Casey*, 505 U.S. 833, 865–66 (1992).

⁵ *Id.* at 866.

law is inaccessible to its citizens and, in many cases, even its own justice system. With little priority given to the effective adjudication of cases, reporting and publication of law is even more underfunded and underappreciated. In these environments, the legitimacy of the judiciary is often doomed to a similar fate. Perhaps the greatest and most insidious human rights violation is that much of the world lives without access to the rule of law, and is thus powerless to combat more explicit human rights violations. The tide, however, may be turning.

Increasing scholarship argues that access to information in general is an emerging human right.⁶ These scholars express the view that the right to access government information, including law, is an ancillary right to a variety of other human rights.⁷ “In order for *any* given human right to be exercised, citizens must have access to information about that specific right; therefore, governments are obligated to inform citizens about human rights.”⁸

International lawyer and legal scholar Toby Mendel suggests that access to information itself is a standalone human right.⁹ “After surveying several international human rights instruments and national court rulings, [Mendel] concluded that ‘freedom of information is now widely recognized as a fundamental human right.’”¹⁰ Mendel maintains that “[t]he primary human rights or constitutional source of the right to freedom of information is the fundamental right to freedom of

⁶ See Cheryl Ann Bishop, *Access to Information as a Human Right*, in *LAW AND SOCIETY* 16, 18–34 (Melvin I. Urofsky ed., 2012).

⁷ See *id.* at 19–20 (citing Christopher Gregory Weeramanty, *Access to Information: A New Human Right. The Right to Know*, 4 *ASIAN Y.B. OF INT’L LAW* 99, 111 (1994)).

⁸ *Id.* at 20 (citing Weeramanty, *supra* note 7, at 102).

⁹ See Toby Mendel, *Freedom of Information: An Internationally Protected Human Right*, 1 *COMP. MEDIA L.J.* 39, 40 (2003). On the other hand, some have argued that human rights provisions such as article 19 imply only a right to receive otherwise generally accessible information, and not an obligation on governments to impart information, unless that information pertains to the individual seeking the information. See Anthony Mason, *The Relationship Between Freedom of Expression and Freedom of Information*, in *FREEDOM OF EXPRESSION AND FREEDOM OF INFORMATION* 225, 227 (Jack Beatson & Yvonne Cripps eds., 2000). However, even under this argument, access to law would thus remain a primary fundamental human right, as those seeking access to the courts are in reality seeking access to and enforcement of the law. Therefore, regardless of one’s views on the broader human right to access information in general, access to law is an especially fundamental human right.

¹⁰ Bishop, *supra* note 6, at 22 (quoting Mendel, *supra* note 9, at 66) (footnotes omitted).

expression.”¹¹ For example, article 19 of the Covenant on Civil and Political Rights provides that “[e]veryone shall have the right to freedom of expression; *this right shall include freedom to seek, receive and impart information* and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.”¹² Mendel argues that this right to seek information places an obligation on government to provide access to the information it holds.¹³

The fundamental human right to access the law is both ancillary and directly implied within international human rights provisions. Several nations even make the right explicit in their constitution. Uganda is one such nation.¹⁴

A. International Law

Many of the articles of human rights conventions presuppose that citizens have access to the law of that country. For example, article 8 of the Universal Declaration of Human Rights provides that “[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”¹⁵ Such a provision indicates that access to law is at least an ancillary human right. Implicit in this statement is the idea that one has access to or knowledge of the constitution or law granting him the right allegedly violated.¹⁶ Thus, perhaps the most fundamental human right is one’s right to know and access all the other rights guaranteed to her as a human being.

Article 14 of the International Covenant on Civil and Political Rights provides, among other things, that “[i]n the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing”¹⁷ Again, in order to guar-

¹¹ *Id.* (quoting Mendel, *supra* note 9).

¹² International Covenant on Civil and Political Rights art. 19(2), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR] (emphasis added).

¹³ Mendel, *supra* note 9.

¹⁴ CONSTITUTION OF THE REPUBLIC OF UGANDA 1995, art. 41 [hereinafter CONSTITUTION], available at <http://www.ulii.org/ug/legislation/consolidated-act/0>.

¹⁵ Universal Declaration of Human Rights, G.A. Res. 217 (III) A, art. 8, U.N. Doc. A/RES/217(III) (Dec. 10, 1948) [hereinafter UDHR].

¹⁶ See Bishop, *supra* note 6, at 19–20.

¹⁷ ICCPR, *supra* note 12, art. 14(3)(b).

antee the right to adequate facilities for the preparation of a legal defense, the law that makes up that defense must be accessible. In provisions such as this, access to law as a standalone fundamental human right is directly implicated, as the law is a necessary part of the facilities necessary to prepare one's legal defense, and without adequate access to the law, adequate time to prepare a defense may be meaningless.

As Gary Haugen, President and CEO of International Justice Mission, argued, "Two generations of global human rights efforts have been predicated—consciously or unconsciously—on assumptions about the effectiveness of the public justice systems in the developing world."¹⁸ That predication is that justice sectors can practically enforce international law and human rights proffered by multinational organizations or international treaties.

Many of these justice systems, however, lack the tools to disseminate and enforce those rights.¹⁹ By analogy, the failure to provide access to the law where human rights are involved is similar to a scenario where scientists spent the last sixty years working on a life-saving vaccine that people desperately needed, but could not access.²⁰ In many cases, those who have the greatest need for knowledge of their human rights—those living in the developing world—have no way to access them.

B. Ugandan Law

The African Commission on Human and People's Rights²¹ adopted the Declaration of Principles on Freedom of Expression in Africa, which states that "the right to seek, receive and impart information . . . is a fundamental and inalienable human right and an indispensable component of democracy."²²

In Uganda, the Constitution explicitly holds out access to law and other public documents as a fundamental human right. Within the

¹⁸ Gary Haugen & Victor Boutros, *And Justice for All: Enforcing Human Rights for the World's Poor*, 89 FOREIGN AFF. 51, 55–56 (2010).

¹⁹ *Id.* at 56.

²⁰ *Id.*

²¹ See Bishop, *supra* note 6, at 39–40 (discussing the African Comm'n on Human & People's Rights).

²² *Id.* at 40 (quoting the African Comm'n on Human & People's Rights, Resolution on the Adoption of the Declaration of Principles on Freedom of Expression in Africa, ACHPR/Res. 62 (XXXII) (Oct. 2002)).

chapter entitled, “Protection and Promotion of *Fundamental* and Other *Human Rights* and Freedoms,” the Ugandan Constitution states:

Every citizen has a right of access to information in the possession of the State or any other organ or agency of the State except where the release of the information is likely to prejudice the security or sovereignty of the State or interfere with the right to the privacy of any other person.²³

Where access to information is made explicit by a country’s laws, the UN Special Rapporteur states that such access to information includes “all bodies performing public functions, including governmental, legislative and judicial bodies.”²⁴ Yet, even where the guarantee of the fundamental human right to access both statutory and judge-made law is made explicit by the country’s own supreme law, many citizens, and even the judiciary itself, may lack access to much of its own laws.

When discussing challenges related to the dissemination of law, it is helpful to acknowledge that law comes in many forms. For example, Uganda’s legal system is based on a combination of statutory law, common law, and African customary law.²⁵ As with most countries that were once British colonies, it is a Commonwealth nation, and is thus considered a common law jurisdiction.²⁶

Under the common law system, statutory text is interpreted relatively narrowly, and judicial decisions, rather than legislation, declare and interpret the majority of the law.²⁷ The modern common law legal system developed in medieval England²⁸ and was later inherited by

²³ CONSTITUTION, *supra* note 14, art. 41 (emphasis added).

²⁴ Bishop, *supra* note 6, at 76 (quoting Special Rapporteur, *Civil and Political Rights, Including the Question of Freedom of Expression*, ¶ 39, UN Doc. E/CN.4/2006/55 (Dec. 30, 2005) (by Ambeyi Ligabo)).

²⁵ See Brenda Mahoro, *Uganda’s Legal System and Legal Sector*, GLOBALEX (Aug. 2006), <http://www.nyulawglobal.org/globalex/uganda.htm>.

²⁶ David Mpanga, *Uganda*, in INTERNATIONAL BANK AND OTHER GUARANTEES HANDBOOK: MIDDLE EAST AND AFRICA 703, 703 (Yann Aubin et al. eds., 2011).

²⁷ Joseph Dainow, *The Civil Law and the Common Law: Some Points of Comparison*, 15 AM. J. COMP. L. 419, 425–26 (1967). By way of contrast, in the system of the civil law and of codified law, legislation occupies the most highly respected place as a source of law. The attitude of the courts is not only one of liberal and extensive interpretation of texts. Even in totally new kinds of cases, civil law courts generally look for a legislative text and its underlying principles which they can use in one way or another as a basis for their new decision. *Id.* at 426.

²⁸ *Id.* at 421–22.

Commonwealth nations that were once British colonies, including Uganda.

What allows common law legal systems to have stability and continuity is the doctrine of precedent: that once a point of law is decided, the same result must be reached when the same problem arises again; a judge is obliged to follow earlier decisions, which make up legal precedent.²⁹ If there is no precedent on point, then the issue before the court is considered one of first impression, and the judge adjudicating the conflict may craft the rule of law that will become precedent for similar future disputes.

While the Ugandan Constitution of 1995 is the supreme law of the land in Uganda, it, as well as Uganda's statutory law, is interpreted and applied through case law precedent. Thus, in Uganda, there are many layers of law, created by many different governing bodies, all of which should ideally be accessible to its citizens.

II. THE VIOLATION

Despite the importance of legal precedent in developing a strong and independent judiciary, especially in common law nations, legal reporting is no easy task in the developing world. The cost of expertise required for manual printing and compiling of case law often exceeds budgets struggling to fund the basic administration of justice.³⁰ While digital online publishing has become more affordable in recent years, it still requires significant technological expertise and the support of the lawmakers themselves, many of whom do not know how to use word-processing software or the Internet.³¹

²⁹ *Id.* at 425.

³⁰ See Anthony Wesaka, *Uganda: Judiciary Not Free, Says Odoki*, MONITOR (Sept. 11, 2011), available at <http://allafrica.com/stories/201109110036.html>. Benjamin Odoki, Chief Justice of the Supreme Court of Uganda, speaking at the 2011 Southern Africa Chief Justices Forum: "Suffice to mention that the meager resources allocated to the Judiciary and as compared to the other organs of government only go to explain the real place of the Judiciary in Africa." Odoki further "called on African governments to prioritise the work of the Judiciary in its budgets, saying the courts can only play their role if well facilitated." *Id.*

³¹ Uganda lags behind much of the world in per capita Internet usage. According to the Internet Telecommunication Union, as of 2010 only 9.6% of Uganda's population used the Internet compared to the United States at 77.3%. See *Uganda*, INTERNET WORLD STATS, <http://www.internetworldstats.com/af/ug.htm>; *United States of America*, INTERNET WORLD STATS, <http://www.internetworldstats.com/am/us.htm>. Lack of Internet use is evident among members of the judiciary. Many of older judges were raised and spent the majority of their careers without computers.

This scenario is not limited to Uganda, and it is a leading factor contributing to corruption in other judiciaries, such as India.³²

A. When Precedent is Inaccessible

Pepperdine law students arriving in Uganda in June 2008, found the basement of the High Court building filled with decades of unorganized and unreported case law.³³ The judges in Uganda's High Court "operate completely on their own with no support staff of any kind."³⁴ Because they do not have law clerks, they research, develop, and write all of their opinions.³⁵ They do not have court reporters, so the judge, with a pen and paper, must furiously take notes for himself throughout the trial.³⁶ Consequently, the proceedings only move as fast as the judge takes notes.

The practical operations of the court (filing the cases, updating the files, setting the docket, and tracking court proceedings) are handled by a small group of administrators within the registrar's office. As one student observed, "Among these employees, morale is low, pay is poor, and management is particularly lacking. As a consequence, much of their duties are either not done at all or done haphazardly."³⁷

As such, they are slow to adopt new technologies. This lag can also be attributed to infrastructure delays. In December 2009, the first high-speed Internet network, Seacom, finally reached Kampala. High speed was still not immediately available until localized infrastructure caught up.

³² See Haugen & Boutros, *supra* note 18, at 53.

³³ "The High Court of Uganda is the third court of record in order of hierarchy [below the Supreme Court and Court of Appeal] and has unlimited original jurisdiction. [This] means that it can try any case of any value or crime of any magnitude." Mahoro, *supra* note 25. Appeals also come to the High Court from the Magistrates Courts, which adjudicate the bulk of all civil and criminal cases in Uganda. *Id.* Thus, the High Court creates precedent which is binding on the courts below.

³⁴ Greer Illingworth, *Dust, Must, and Archives*, THE LAMP STAND (June 17, 2008), <http://greerillingworth.blogspot.com/2008/06/dust-must-and-archives.html>.

³⁵ *Id.* Pepperdine's Global Justice Program began working in Uganda at the invitation of Uganda's Chief Justice, Benjamin Odoki, who asked Pepperdine students to provide needed legal research. Based largely on the success of this initiative, Uganda began adopting its own law clerk initiative with recent Ugandan law school graduates. Initially, these law clerks serve the highest levels of the bench, including the Chief Justice and Deputy Chief Justice, with the judiciary looking to expand the program further.

³⁶ *Id.* Although, recently, a few courtrooms in the commercial court have been outfitted with digital recording systems so that a judge can go back and listen to the proceedings, should he or she have the inclination to do so.

³⁷ *Id.*

Students witnessed the extent of weak administration when viewing the court's archive. Intended to be the hub where all precedent is stored, indexed, and made easily accessible to judges, the reality of the court archives was far different. The archive was located in the basement where cases were in unorganized piles from floor to ceiling. Cases could easily be hidden or even destroyed, as happens in instances of corruption.³⁸

By the end of July 2008, the students organized and shelved the cases from 1980 forward in chronological order, but all of the case law prior to 1979 remained unorganized in piles from floor to ceiling due to insufficient shelving.³⁹ "Further, those files fortunate enough to be placed on a shelf were not indexed . . ."⁴⁰ Thus, "if a court orderly was tasked with finding a case he or she could only go to the year it was handed down and have to sift through the hundreds of files for that given year."⁴¹ Even then, the odds of finding a particular case were reduced since many were misplaced, destroyed, or damaged over the years.⁴² When organizing the archive, the students sometimes found entire years' worth of cases missing.⁴³ On average, for every hundred case files, they estimated that approximately forty were missing.⁴⁴ Even today, a very small minority of High Court cases are digi-

³⁸ *Id.* One student's report on the conditions of the archives:

Located deep in the basement [of the high court] . . . the archive is more of a case dumping ground . . . Dust allergens and the musty smell of water and neglect permeate when entering. The stairwell light switch doesn't work, so you have to slowly navigate your way down each step until reaching the only working light. Appearing out of the dark, you see piles and piles of old case files stacked against the walls. Unregistered in any database, appeals decisions were mixed in with session decisions and old cases are mixed in with new. To the right when entering, is a door-frame leading into a separate room entirely covered floor to ceiling with cases from the days of Idi Amin and before. . . . The threat of foul play and corruption is great here due to the disorder of the files. It is not unheard of for a clerk to hide or outright destroy a case file if paid off. One can only guess how much precedent has been lost [and how many human rights have been violated] over the years due to such practices.

Id.

³⁹ Illingworth, *supra* note 1.

⁴⁰ *Id.*

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.* By the time the students left at the end of July 2008, construction had begun on shelving for this older precedent, but the maintenance of this system, as well as the indexing of more current case files and opinions, continues to slip through the cracks.

⁴⁴ *Id.*

tized or formally reported.⁴⁵ A lone paper copy is all the court has to document the proceeding and save the ruling handed down by the court.

The consequence is that judges are making law that is never seen and remains inaccessible to the public at large, and even to the rest of the Ugandan judiciary. As a result, there is little precedent, and contradictory law may be made regularly. Judges can rule as silos, creating their own unchecked opinions. Further, if neither the judge nor the parties can find binding precedent to govern a case and the judge knows that his opinion will never be seen by another judge or lawyer, there is nothing to prevent his opinion from going to the highest bidder; the result is that corruption can run rampant while the legitimacy of the judiciary suffers. Thus, the violation of this fundamental human right contributes to the violation of many other rights.

Even among those judges who are inclined toward public justice, limited access to law reduces their ability to do so in a legitimate and respectable way.

When one American law student received his first case file at Uganda's Court of Appeal in May 2011, he asked the Deputy Chief Justice's assistant for advice on how one should go about researching and formatting a Ugandan appellate opinion.⁴⁶ The assistant responded that he should read the facts of the case and then "figure out how you *feel* about the case and who you *feel* should have won. Then look to see whether the law allows you to make that decision."⁴⁷

Arguably, the most often cited precedent in Ugandan appellate opinions is *Dinkerrai Ramkrisha Pandya v. Regina*.⁴⁸ Regardless of its actual language, it is frequently cited by both the Ugandan Court of Appeal and the Ugandan Supreme Court for the proposition that all appeals are to be reviewed *de novo*, even as to issues of fact.⁴⁹ This, combined with both the courts' and the parties' limited access to precedent, means that many decisions can often be made at a judge's whim, even if there is a well-reasoned opinion from the court below.⁵⁰

⁴⁵ See Ulii.org for the cases that are digitized.

⁴⁶ The Deputy Chief Justice is the head of Uganda's Court of Appeal.

⁴⁷ Personal experience of Mark Reinhardt.

⁴⁸ *Dinkerrai Ramkrishna Pandya v. Regina*, 2 J. AFR. L. 122 (1958), available at <http://www.jstor.org/stable/745268?seq=1>.

⁴⁹ See *Oryem Richard v. Uganda*, UGSC 13 (Uganda 2010); *Kyomuhendo David & Anor v. Uganda*, UGCA 26 (Uganda C.A. 2009).

⁵⁰ Uganda's judiciary is not alone in relying on *Pandya* for this expansive appellate authority. See, e.g., *Dotto s/o Ikongo v. Republic*, TZCA 70 (Tanz. C.A. 2006).

B. When Statutory Law is Inaccessible

The problem, however, does not end with the lack of organized case law reporting. Uganda's courts also often find themselves with incomplete access to their own statutory law. While working for the Court of Appeals, a student was asked to edit an opinion draft written by the Deputy Chief Justice's assistant. The case involved a real property suit filed with and heard by a magistrate judge in October 1998.⁵¹ The opinion held that Public Land Act of 1998, section 98, stripped the magistrate judge of jurisdiction to hear the case, and the case should have been brought before one of the land tribunals created by the same act.⁵²

Unfortunately for the assistant, the Court of Appeals did not possess a complete version of the Laws of Uganda, and the only law cited by the parties was the Public Land Act of 1998, section 98. Even more unfortunate, the Public Land Act was a political maneuver, and the land tribunals were never actually formed. Thus, the court would, *sua sponte*, dismiss the case for want of jurisdiction in the court below and hold that certain land disputes had to be brought in the first instance before a non-existent tribunal.

By a stroke of luck, the student previously came across the Land (Amendment) Act No. 3 of 2001 at the Commercial Court library during another project. This act recognized the failure to create functioning land tribunals and retroactively amend the Public Land Act of 1998, section 98, to return jurisdiction over land disputes to the magistrate judges.⁵³ Thus, the Court of Appeals retained jurisdiction over the case and had to resolve it on the merits. This scenario illustrates how lack of access to law by the courts leads to opinions which are not only incorrect, but prevent due process.

The Land Act opinion, recognizing the failure of an entire system of tribunals, should be precedent available to the public resolving all jurisdictional matters in land disputes. Instead, the opinion was printed, placed in a file in a box, and never published in any court reporter or on Uganda's online legal research resource (Ulii.org).

⁵¹ See Land Act, 1998, ch. 227, § 98(7) (Uganda).

⁵² See *id.* at §§ 74–87, 98(7).

⁵³ The Land (Amendment) Act of 2001 amended section 98 of the Land Act of 1998 by “(b) substituting for Subsection (7) the following: (7) Until the Land Tribunals are established and commence to operate under this Act, Magistrates’ Court and Local Council Court shall continue to have jurisdiction they had immediately before the commencement of this Act.” Land (Amendment) Act No. 3, 2001, ch. 227, §2(b) (Uganda).

Access to law violations compound human rights violations in Uganda and other developing nations as they experience the growing pains of economic modernization. Uganda, for example, is currently transitioning from primarily customary land tenure systems to a primarily freehold title tenure system.⁵⁴ A byproduct of this transition involves banks and developers taking land from traditional owners and tenants with little or no compensation.⁵⁵ In Uganda, where nearly 80% of households receive their main source of income from subsistence farming, losing one's land or the right to farm it can be disastrous.⁵⁶

In the matter of Ugandan land disputes, it is likely that many valid suits over land ownership are erroneously dismissed by the courts due to the courts' and the counsels' incomplete access to the most current amendments of Ugandan law. Even if the party seeking to dismiss the lawsuit finds the more recent amendments, this party has no incentive to include the overlooked case in its brief knowing the judiciary itself will not likely find the law. Thus, these traditional landholders could have their property and their livelihood taken from them without any proper procedural due process of law, a violation of article 8 of the Universal Declaration of Human Rights.⁵⁷

III. STEPS TOWARD A SOLUTION

The cost of traditional paper publishing and indexing of law is often prohibitively expensive in the developing world. The Internet and advances in open source software, however, make the ability to publish and access law around the world much more affordable—even for developing nations.⁵⁸ Furthermore, the development and growth of

⁵⁴ Registration of Titles Act, 1924, ch. 230 (Uganda); see generally Norah Owaraga, *Conflict in Uganda's Land Tenure System*, AFRICAPORTAL (May 14, 2012), <http://www.africaportal.org/articles/2012/05/14/conflict-uganda's-landtenure-system>.

⁵⁵ See Owaraga, *supra* note 54. For a discussion of this development in Africa generally, see also Lorenzo Cotula, *Analysis: Land Grab or Development Opportunity?*, BBC NEWS (Feb. 21, 2012), <http://www.bbc.co.uk/news/world-africa-17099348>.

⁵⁶ DOUGLAS GOLLIN & RICHARD ROGERSON, AGRICULTURE, ROADS, AND ECONOMIC DEVELOPMENT IN UGANDA I (Mar. 2010), available at http://cbey.research.yale.edu/uploads/Environmental%20Economics%20Seminar/Gollin_and_Rogerson_Agriculture_Roads_and_Economic_Development_in_Uganda,_3-19-10.pdf.

⁵⁷ See UDHR, *supra* note 15.

⁵⁸ Daniel Poulin, *Open Access to Law in Developing Countries*, FIRST MONDAY (2004), <http://firstmonday.org/htbin/cgiwrap/bin/ojs/index.php/fm/article/>

legal information institutes (LIIs) has allowed many nations to begin the process of publishing their laws online with the help of those in developed justice sectors who already paved the way.⁵⁹

Uganda's online Legal Information Institute, ULII (available at www.Ulii.org), was originally created by the South African Legal Information Institute (SAFLII). As a result, Uganda now has a basic, freely accessible online legal database. This database, however, is far from complete. There are a number of challenging steps involved in effectively implementing legal databases, and Uganda has not finished the transition.

A. Developing a Database

The first step in wide dissemination of law via the Internet is the creation of a digital platform to house published law. The development of user friendly, open source software and the pioneering work done by LIIs around the world has made the process of building a database fairly simple and inexpensive in recent years. In most developing nations, open source software is critical, as proprietary software can lead to extremely onerous technological dependence which can harm long term viability to the resource.⁶⁰ Uganda has an online database at Ulii.org, but there is more to free access to law than simply a functioning web address.

B. Training the Technical Experts, and Giving Them Control

A decade ago, scholars argued that the most formidable challenge to developing open access to law in developing countries was "the development of local skills and knowledge necessary to electronic publishing of law" and maintaining properly functioning computer systems.⁶¹ Fortunately, many developing nations are beginning to acquire these skills.

view/1193/1113 (stating that "all the software required for establishing public access to law is now available at no charge.").

⁵⁹ For a list of Legal Information Institutes providing free and independent access to the law online, see www.WorldLii.com.

⁶⁰ Poulin, *supra* note 58. "The inherent danger of such business models . . . is that they could lead to onerous technological dependence. . . . For [this] reason[], open source software is especially valuable for developing open access legal information infrastructures." *Id.*

⁶¹ *Id.*

When American law students arrived in Uganda in May 2011, Ulii.org existed, but very few laws were available online, and the website lacked any search capability. Thus, if one wanted to find a particular case online, they had to know the exact names of the parties, as well as the court and year of publication. If these critical identifiers were recollected by a judge or registrar, they could click through a maze of links in the database to find the case, assuming it was available online at all.

When the students asked why there was no search function on the website, they were told that Ulii.org was hosted by SAFLII, and that in order to make any changes to the site, including uploading new case law, they must petition SAFLII, which was itself struggling in the wake of the current global recession. In order to mitigate the problem with the search function, one student created an independent website called Uliisearch.org using software freely available from Google that could make Ulii.org searchable.⁶² This site, however, was a bandage, not a cure, and did not streamline the uploading of case law.

In early 2012, SAFLII gave direct control of Ulii.org to a Ugandan counterpart.⁶³ Since then, a working search function was added, and the rate at which Ugandan Court of Appeals cases were published online nearly tripled.⁶⁴

It is typically a simple process to upload recent law as judges are increasingly typing their opinions in a word processor to make them immediately available in a digital format. Uploading older law—which is often equally relevant and binding—poses the greater challenge due to labor and infrastructure expenses. This digitization process requires scanners with Optical Character Recognition (OCR) software to convert the documents into a searchable text format. The process is not foolproof—documents come in various shapes and sizes, older typewriter-drafted opinions can be difficult for software to process, and handwritten opinions are nearly impossible to process automatically. Given that OCR is not completely accurate, courts are

⁶² See www.Uliisearch.org.

⁶³ E-mail from Jane Mugala to Mark Reinhardt, Clerk, Deputy Chief Justice of Uganda (June 7, 2012) (on file with author). See also Mariya, *ULII Migrates to a New Platform*, ULII (Nov. 18, 2011, 1:18 PM), <http://www.ulii.org/content/ulii-migrates-new-platform>.

⁶⁴ Compare *Court of Appeal: Decisions in 2011*, <http://www.ulii.org/ug/judgment/court-appeal/2011> (last visited Oct. 7, 2012) (listing decisions published in 2011), with *Court of Appeal: Decisions in 2012*, <http://www.ulii.org/ug/judgment/court-appeal/2012> (last visited Oct. 7, 2012) (listing decisions published thus far in 2012).

typically hesitant to rely on it for published opinions when even minute inaccuracies can change the meaning of a word or sentence. OCR will also overlook in-text notations, which may reflect a judge's edit, clarification, or the final order itself. In the view of many judges, the only solution is for someone to manually review and edit each opinion before it is published. This manual review creates a costly and time-consuming bottleneck in workflow.

Digitizing Uganda's paper precedent and converting it into a searchable format for online publication is estimated to take more than a year of full-time work. The category of high speed scanning typically starts at 5,000 pages per day. Scanning speed, however, is not the limiting factor. Paper quality, sizes, and bindings vary widely in Uganda. Some legal documents are still bound with twine and many judgments are still handwritten. On top of scanning, significant manual labor will be required to sort, categorize, and develop a cataloging system. While steep, these challenges are not insurmountable.

Pepperdine and Uganda reached out to Google to develop a plan for the uploading, indexing, and dissemination of Uganda's law through Google Books and Google Scholar. Complications arose with respect to copyright issues and accuracy review.

LexisNexis was also contacted to assist in digitizing case law. Developing the reporting infrastructure would likely cost between \$250,000 and \$500,000 based on the amount of material to be scanned.⁶⁵ In exchange for a fifteen-year licensing agreement, LexisNexis offered to provide the Uganda judiciary with free physical reporters and free Internet access to its database. The upfront infrastructure costs and, particularly, exclusivity of content, were barriers to this route.

C. Engaging the Bench as Stakeholders

The final and arguably most difficult step towards wide dissemination of legal precedent online lies with the judges themselves adopting and utilizing the technology. Some scholars suggest that digitizing paper-based documents is not the most practical starting point for an open access project, and that these efforts should be saved until the bench and other governing bodies buy into the project.⁶⁶

⁶⁵ E-mail from Kevin Assemi to Jay Milbrandt, Dir., Global Justice Program (Aug. 24, 2009) (on file with author).

⁶⁶ See Poulin, *supra* note 58 (stating "it is reasonable to start at the top of the judicial hierarchy and working down to more local tribunals").

Internet access in Africa is growing at a breakneck pace. In Uganda, nearly 13% of the population had Internet access in 2010, and if the growth trend has continued, it should be somewhere close to 20% today.⁶⁷ Indeed, in 2009, more than half of Ugandans living in Kampala had Internet access.⁶⁸ That number is likely closer to 75% today. As part of an older generation, however, many judges in Uganda still do not use computers, and even some of those who do, simply print off their opinions for filing in the archives rather than taking further steps to upload them.

The final step for nations like Uganda will require a paradigm shift among the members of the bench.⁶⁹ This will require the bench viewing its responsibility as not just to the parties as arbiters of a discrete case, but also to the wider public as makers and interpreters of law. The judiciary will need to mandate digital orders and implement a strategy for the judges to easily upload—a simple macro function or a staff member assigned to uploading opinions—and self-enforce this system.

A further important step will be the development and use of a uniform citation system.⁷⁰ Uniform citations systems allow for easier access, better organization, and automated hyperlinking (making legal research much more efficient). Uganda currently lacks such a system, adding to the difficulties of researching the precedent behind an opinion—it is difficult to find unless the case cite is already known.

This paradigm shift may be much more difficult to achieve in other developing nations. In autocratic and even many nominally democratic developing societies, where one regime holds a majority of the power for a prolonged period of time, there is little incentive to maintain the

⁶⁷ *Internet Users as Percentage of Population*, GOOGLE PUB. DATA (July 13, 2012), http://www.google.com/publicdata/explore?ds=d5bncppjof8f9__&met_y=it_net_user_p2&idim=country:UGA&dl=en&hl=en&q=internet+usage+in+uganda (last visited Oct. 7, 2012) (citing data from the World Bank).

⁶⁸ Mwaniki Wahome, *Uganda: Kampala Leads in Internet Use*, DAILY NATION (Oct. 27, 2009), <http://allafrica.com/stories/200910270854.html>.

⁶⁹ As a judiciary, Uganda is well positioned to have its judiciary commit to supporting the dissemination of its laws online, but this transition will take time. Younger justices are, indeed, spearheading efforts to digitize precedent and streamline court processes. They are constantly making progress in small increments. Older justices, some who may not even know how to type, still understand the value of publishing opinions online, and are willing to provide their opinions to the proper specialists for online publication. Nonetheless, there are also still judges who do not understand the value of the precedent they are creating at all.

⁷⁰ See generally Poulin, *supra* note 58.

rule of law through a strong and independent judiciary.⁷¹ Those in power enjoy the ability to receive special treatment when there is a lack of strong precedent that would otherwise require that they be treated equally and impersonally under the law.⁷²

D. Respecting Foreign Customs and Protecting Private Enterprise

The critical reader might take this article as imposing a distinctly Western or American idea of access to law as a human right on developing nations when these nations also rely heavily on customary law. On the contrary, helping developing justice sectors disseminate their own law to a broader audience allows them to protect the customary nuances of their own law from being choked out and replaced by creeping international or foreign law.⁷³ Encouraging the dissemination of local or regional law will help develop laws that define and protect human rights in a more compatible and effective manner than is the case when a country is forced to accept a foreign legal system to enforce foreign legal values.

At the same time, wider dissemination of law will directly assist the poor and middle class. By making the law accessible to the public in a legitimate form and by helping ordinary citizens access their rights, “dormant demands for the rule of law among the middle class [might be] reignited, local leaders encouraged by these demands [may] begin to emerge, and obstructionists [may] begin to be marginalized.”⁷⁴

One might ask whether encouraging the development of free legal research tools will discourage private legal publishers, which have a financial incentive to develop effective databases. As Poulin wrote, “Public access to law hardly undermines the importance of private legal publishing, since a free resource not only acts as a supplier, but also facilitates commercial legal publishing.”⁷⁵ In nations such as Uganda, even the best commercial publications of law are mediocre at

⁷¹ See BARRY R. WEINGAST, WHY DEVELOPING COUNTRIES PROVE SO RESISTANT TO THE RULE OF LAW 18–28 (2008), available at <http://www.stanford.edu/group/polisci/faculty/weingast/WeingastROL.pdf>.

⁷² See *id.*

⁷³ See Poulin, *supra* note 58 (stating that “to avoid a unilingual, single-tradition legal context, a better dissemination of the law from countries with civil law traditions should be promoted.”).

⁷⁴ Haugen & Boutros, *supra* note 18, at 61.

⁷⁵ Poulin, *supra* note 58.

best.⁷⁶ A significant reason for the lack of effective legal publications in Uganda is that finding and collecting the law is such an expensive and labor intensive feat, that in order to remain profitable, very little value can be added by providing topical indexing, syllabi, or headnotes. If the law in its raw form is freely and easily accessible, commercial publishers can turn their attention to true value added functions.

CONCLUSION

Medicine does little good if it cannot be effectively provided to the sick. Likewise, human rights law is an empty promise if the underlying law is inaccessible. Uganda is an example of a developing nation where inaccessible law, to both citizens and the judiciary, is an impediment to justice. Uganda, however, also serves as an example of a nation that is striving toward wider dissemination of its law to its citizens and its judiciary.

In the last five years alone, significant developments in technology and Internet access have provided a viable and cost-effective solution. Still, there are many cultural and paradigmatic challenges faced by nations seeking to disseminate their law to the public (even if they do have easy Internet access).

The global legal community must address access to law in developing nations, starting with three recommendations.

First, the global legal community must acknowledge and address access to law as a basic human right, fundamental to even the most basic human rights including due process.

Second, the global legal community should set standards for what meets the modern criteria for access to law. These standards may include defining what constitutes publication (e.g. print and digital), how it should be published (e.g. written opinions, summaries, reporters, and frequency), and where it may be accessed (e.g. court library, public library, the Internet). Standards may set a global, uniform citation system. Standards will also need to address language availability for countries with multiple languages.⁷⁷

⁷⁶ Interview with Justice Kiryabwire, Head Judge, Commercial Division, High Court of Uganda, Uganda, E. Afr. (July 11, 2011) (on file with author).

⁷⁷ Rwanda, for example, is working to provide its cases in Kinyarwanda, French, and English. Uganda provides its cases in English (the national language), but many other languages are spoken, such as Acholi in the north where English and Lugandan are hardly spoken.

Third, the global legal community should invest in access to law projects. Developing nations will need assistance with basic infrastructure costs, such as scanning, database development, and publication to the Internet. These costs could be shared by developing open source database software and organizing a global taskforce armed with scanners and experts who can assist with archive digitization, rather than insist that nations fully incur the costs.

The stakes for addressing this issue are high. Developing nations have little incentive to provide their citizens with this fundamental human right—the right to access the law. In these places, Bentham’s words will continue to ring true: the poor will suffer injustice until the law is held up to the light.⁷⁸

⁷⁸ BENTHAM, *supra* note 2.